but making no exception as to occupancy already established was declared invalid as exceeding the charter powers of the city council. In *Cary* v. *Atlanta*, 143 Ga. 192, the ordinance was declared invalid on the ground that it worked such a deprivation of property as to violate both the Federal and State constitutions.

In this view of the case it is difficult to resist the belief that perhaps the court's decision was in reality consciously or sub-consciously based upon the conviction that the restriction imposed by the ordinance upon the plaintiff's right to dispose of his property was not clearly unreasonable in relation to the possible benefit to the public welfare, but rather upon the feeling that the ordinance, while equal and reciprocal in phraseology, as regards the two races, does in reality, the facts of life being what they are, discriminate heavily against the negro race, and that the restrictions thus put upon its rights to acquire, use and sell property with all the consequences entailed are altogether greater than any possible good to be derived by the general public therefrom. Possibly the court foresees that the line has now been reached where the dangers suggested by Justice Harlan in his strong dissenting opinion in the Civil Rights Cases, 109 U. S. 3, has been reached.[17] The court may have felt that even conceding that the ordinance, if sustained, might tend to prevent conflicts between individuals or small groups from the two races, its ultimate effect in building up wholly black and wholly white communities in the same city would almost certainly produce far greater and more menacing conflicts than those which the present ordinance is supposed to prevent.

It may well be that by a process of unexpressed reasoning, the court has reached a sound result in this case; but clearly the real question involved ought to be settled only after careful consideration of the *facts*, as to the effect of propinquity and intermingling of the races. Perhaps there is sufficient danger in such contacts as to justify this legislation, perhaps not. It is regrettable that the whole problem could not have been brought before the court, by the aid of briefs such as those filed by Mr. Brandeis and Professor Frankfurter in the Oregon cases.[18]

LIABILITY OF CHARITABLE CORPORATIONS FOR TORT. — The belief in the reality of corporate persons only slowly makes its way into the

sulting from the occupancy by colored people of houses in blocks theretofore occupied wholly by white people." "With this acknowledgment," says the court, "how can it be contended that the City Council, charged with looking to the welfare of the city, is seeking to make an unreasonable use of the police power, when it enacts a law which, in their opinion, will tend to prevent the conflict?" See page 547 of the opinion.

[17] *Cf.* McCabe *v.* Atchison, etc. Ry. Co. 235 U. S. 151.

[18] Muller *v.* Oregon, 208 U. S. 412; Stettler *v.* O'Hara, 243 U. S. 629. As to the importance of presenting scientific and dependable data bearing upon the facts and conditions affected by legislation regulating social and industrial relationships, see the following articles: "Hours of Labor and Realism in Constitutional Law," by Felix Frankfurter, 29 HARV. L. REV. 353; "Limitation of Hours of Labor and the Federal Supreme Court," by Ernst Freund, 17 GREEN BAG, 411; "Due Process, the Inarticulate Major Premise and the Adamson Law," by Albert M. Kales, 26 YALE LAW J. 519; "Liberty of Contract," by Roscoe Pound, 18 YALE LAW J. 454.

general body of Anglo-American law.[1] Its progress is at every stage impeded by the general refusal of the courts to recognize the corporate character of the trust. It is nearly thirteen years since Maitland demonstrated with all his profound scholarship, and even more than his wonted charm, that the trust has, above all things, served historically as a screen to promote the growth of institutions which, for a variety of reasons, have found inadvisable the path of corporate adventure.[2] The result has been peculiarly unfortunate in the realm of charitable trusts. "A trust," said Bacon three centuries ago,[3] "is the tendency of the conscience of one to the purpose of another," and we have stringently adhered — the possibilities of *cy près* notwithstanding — to the rigid enforcement of that purpose without due regard to the category of time or the interests involved. The doctrine, in its legal perspective, is most largely a supposed deference to the rights of property; and it has paid but little attention to the admirable remark of John Stuart Mill[4] that no man ought to exercise the rights of property long after his death. This tendency to emphasize the purpose enshrined in the trust and not the life that trust engenders has received an interesting illustration in a recent Maryland decision.[5] A fireman who was engaged in extinguishing a hospital fire was injured through the defective condition of the hospital fire escape. He sued the hospital for damages, and relief was denied on the ground that the doctrine of *respondeat superior* does not apply to charitable institutions. The result of the case might be justified on the ground that there is no liability for an injury sustained by a licensee, when the injury is brought about by a condition of the premises. The basis of the decision however seems to be the opinion that the funds of a charity are not provided to liquidate the damages caused in its defective administration; and those funds are therefore not applicable to the redemption of the torts committed by the agents or servants of the charity.[6] This doctrine, indeed, is not worked out with entire consistency in other parts of the law, since a charitable institution is liable in an action for breach of contract. Nor is it an universal doctrine since it is not applied by the English courts.[7] What in reality it involves is a whole series of assumptions. It starts out from the belief that a charitable institution is in a different position from other institutions from the fact that its purpose is not one of profit. But this is entirely to ignore the administrative aspect of the problem. To fulfill the purpose of a charity involves all the usual features of an ordinary corporate enterprise. The charitable institution acts by agents and servants. It harms and benefits third parties exactly as they are harmed or benefited by

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[1] *Cf.* Laski, 29 HARV. L. REV, 404 *ff.*

[2] *Cf.* 3 COLL. PAPERS, 321 *ff.*

[3] READING ON THE STATUTE OF USES, 9.

[4] "Essay on Corporations and Church Property" in vol. I of his DISSERTATIONS AND DISCUSSIONS.

[5] Loeffler *v.* Trustees of Sheppard and Enoch Pratt Hospital (1917), 100 Atl. 301.

[6] Overholser *v.* National Home for Disabled Soldiers, 68 Ohio St. 236; McDonald *v.* Mass. General Hospital (1876), 120 Mass. 432; Jensen *v.* Maine Eye and Ear Infirmary (1912), 107 Me. 408; Downes *v.* Harper Hospital (1894), 101 Mich. 555.

[7] Duncan *v.* Findlater, 6 Cl. & Fin. 894 (1839), was decided in American fashion; but since Mersey Docks Trustees *v.* Gibbs (1866), 1 H. L. 93, the rule has been the other way.

other institutions. Where fault is involved it is difficult to see why the exception should be maintained. It is small comfort to an injured fireman to know that even if he has to compensate himself for his injuries, he is maintaining the strict purpose of the founder of the charity. To him the case appears simply one of injury, and he suffers not less, but, in the present state of the law, actually more, from the sheerly fortuitous fact that his accident has occurred not at a factory, but at a hospital. The thing of which the law ought to take account is surely the balance of interests involved; and the hospital is far more likely to look to the condition of its ladders if it pays the penalty of its negligence, than if it saves a certain percentage of its income. It would, in fact, be an intolerable situation if the only protection afforded the public against the torts of charities were that of the pockets of agents and servants.[8] Those who founded the charity intended it to be operated; and they, or their representatives, must, logically enough, pay the cost of its operation from the funds provided for that purpose. There are, indeed, some signs that the courts are beginning to appreciate this. Relief has been granted to a claimant against the Salvation Army which negligently allowed one of its vans to run wild.[9] The inadequate protection of dangerous machinery has suffered its due and necessary penalty.[10] The injury which resulted from the employment of an unskilful nurse has not gone unrequited.[11] Not, indeed, that any of these decisions really touch the central problem that is raised. We have in fact a twofold problem, in the first place, we have to inquire whether the creation of a charitable trust does not involve the creation of a corporate person exactly as the creation of any business enterprise; in the second place, the question is raised as to whether there is any ground for the exclusion of a charity from the ordinary rules of vicarious liability. The answer to the first question is clearly an affirmative one. The Salvation Army, an orphan asylum, a great hospital are just as much persons to those who have dealings with them as a private individual or a railway company. Differentiation, if it is to be made, cannot be made on the ground of character. If it is, the courts will go as fatally wrong in the results of litigation as did the House of Lords in the great Free Church of Scotland Case.[12] It was the insistence of the Lords upon the nature of the church as a pendant to a set of doctrines which made it fail to see that more important was the life those doctrines called into being.[13] The life of the Salvation Army, is, in precisely similar fashion, more important than the doctrines it teaches; and we must legally judge its life by what in actual fact it is, and not by the theories it proclaims. Herein is found the answer to the second inquiry. The only reason why a charity should not be liable for fault is its public character. But that, clearly enough, is no adequate reason at all. It is probably a simple analogy from the irresponsibility of the greatest charity by

[8] *Cf.* Laski, 24 YALE LAW JOURNAL, 124 *ff.*
[9] Hordern *v.* Salvation Army (1910), 199 N. Y. 233.
[10] McMerny *v.* St. Luke's Hospital (1913), 122 Minn. 10.
[11] St. Paul's Sanitarium *v.* Williamson (1914), 164 S. W. 36.
[12] See the special report by ORR and the comment by Dr. FIGGIS, CHURCHES IN THE MODERN STATE, 19 *ff.*
[13] *Cf.* 36 CANADIAN LAW TIMES, 140 *ff.*

which the public is served — the state; and an end is rapidly being made of that noxious dogma.[14] It is the merest justice that if the public seeks benefit, if men search to benefit the public, due care should be taken not to harm those interests met in the process which are not directly public also. A charity's personality will suffer no less detriment if it is allowed to be irresponsible than a private enterprise. A hospital, for instance, ought to be forced to take as much care in the selection of its nurses as a banker in the selection of his cashiers. We have found that the enforcement of liability is the only adequate means to this latter end, and it is difficult to see why the same is not true in every other sphere. French law has not hesitated to hold a county asylum liable for the arson of an escaped lunatic; and we may be sure that the prefect of the department concerned will take due care that the superintendent of his asylum is not a second time guilty of negligence.[15] The whole problem is an illustration of the vital need of insisting as much on the processes of institutions as on their purposes. A negligently administered charity may aim at inducting us all into the Kingdom of Heaven, but it is socially essential to make it adequately careful of the methods employed. It is only by the recognition of the personality involved in the trust, and of its consequences, that this end may be satisfactorily achieved.

BOYCOTTS ON MATERIALS.[1] — When one man by the free exercise of his faculties prevents a similar exercise by another, a justiciable question arises. The law meets it by weighing the social value of the two ends in view and allowing to prevail the action directed toward the more socially valuable.[2] Where the ends are of equal social value, the loss must lie where it falls. Hence trade competition will justify an intentional injury, where individual interests alone are balanced, there being no injury to society.[3] But spite, malice, injury for its own sake are not ends which the law can recognize.[4] The history of labor litigation is the history of a broadening conception of this principle.

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[14] *Cf.* Barker, "The Rule of Law," POLITICAL QUARTERLY, May, 1914, and DUGUIT, LES TRANSFORMATIONS DU DROIT PUBLIC, chap. 8.

[15] 3 SIREY, 1908, 98, with note by M. Hauriou.

[1] "The salient characteristic of the boycott on materials is its appeal to organized labor. Its essence is organized disapproval of certain impliments and materials with which men work." WOLMAN, THE BOYCOTT IN AMERICAN TRADE UNIONS, 43. In this class of boycott the disapproval is by those who work with the materials, and not by those who consume them.

[2] See "Interests of Personality," Roscoe Pound, 28 HARV. L. REV. 343, 445. Examples of the application of this principle of the balancing of interests are: The rules of liability for animals; the rule of liability without fault; the so-called Fletcher *v.* Rylands doctrine; the rules of privileged communications in libel and slander. See also Keeble *v.* Hickeringill, 11 East, 574, where defendant is liable for maliciously frightening ducks from the plaintiff's decoys. See also 31 HARV. L. REV. 193, for the principle applied to contracts to refrain from doing business.

[3] Blake *v.* Lanyou, 6 T. R. 221; Adams *v.* Bafeald, 1 Leon. 240; Mogul Steamship Co. *v.* McGregor, Gow & Co. (1892), A. C. 25.

[4] "How far an Act may be a Tort because of the Wrongful Motive of the Actor," James Barr Ames, 18 HARV. L. REV. 411. See Mills *v.* U. S. Printing Co., 99 N. Y. App. Div. 605, 613.